

1344

United States

1344

# Circuit Court of Appeals

For the Ninth Circuit.

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H. ALLEN RISPIN,

Plaintiff in Error,

vs.

THE MIDNIGHT OIL COMPANY, a Corpora-  
tion,

Defendant in Error.

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## Transcript of Record.

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Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

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FILED

MAR 27 1923

F. D. MONCKTON,  
CLERK.



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**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

A. L. WEIL, Esq., and FORREST A. COBB, Esq.,  
1202 Alaska Commercial Bldg., San Francisco,  
Calif.,  
Attorneys for Plaintiff in Error.

DUDLEY D. SALES, Esq., 58 Sutter St., San Fran-  
cisco, Calif.,  
Attorney for Defendant in Error.

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In the District Court of the United States for the  
Northern District of California.

No. 16718.

THE MIDNIGHT OIL COMPANY, a Corporation,  
Plaintiff,

vs.

H. ALLEN RISPIN,

Defendant.

**Complaint.**

Plaintiff complains and alleges:

I.

That at all times hereinafter mentioned plaintiff,  
the Midnight Oil Company, was and is now a cor-  
poration, organized and existing under the laws  
of the State of Colorado and having its principal  
place of business in the City and County of Denver,  
Colorado.

II.

That defendant, H. Allen Rispin (whose first

name is unknown to plaintiff), is now a citizen of the State of California and a resident of Santa Cruz County, in the Northern District of the State of California.

### III.

That this is a civil suit for the recovery of a money judgment and that the amount involved herein, exclusive of interest and costs, exceeds the sum of Three Thousand (\$3,000) Dollars.

### IV.

That heretofore, and on or about the 13th day of May, 1919, there was pending in the District Court of the Second Judicial District in and for the City and County of Denver, State of Colorado, a suit wherein plaintiff herein was plaintiff and defendant herein, together with Wyoming Montana Development Company, were defendants. That plaintiff herein agreed with defendant herein to, and did, dismiss, settle and compromise [1\*] said suit, in consideration whereof defendant herein agreed to pay plaintiff the sum of Ten Thousand (\$10,000) Dollars, upon the terms and conditions set forth in a written instrument signed by said defendant on said 13th day of May, 1919, which is in words and figures, as follows, to wit:

“WHEREAS, a certain action is now pending in the District Court of the City and County of Denver, State of Colorado, wherein the Midnight Oil Company is plaintiff, and H. A. Rispin and Wyoming-Montana Development Company are defendants, and

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\*Page-number appearing at foot of page of original certified Transcript of Record.



WHEREAS, it is the desire of all the parties to said action that the same be compromised and settled, and

WHEREAS, the Hopewell Oil Company has assigned to the Midnight Oil Company part of the benefits arising from an operating contract bearing date of March 24th, 1919, between the Hopewell Oil Company as grantor, and the Associated Oil Company, as operator, of and on the West half (W.  $\frac{1}{2}$ ) of the Northwest quarter (NW.  $\frac{1}{4}$ ) of Section Seventeen (17) and the East half (E.  $\frac{1}{2}$ ) of the Northeast quarter (NE.  $\frac{1}{4}$ ) of Section eighteen (18), Township Thirty-five (35) North, Range sixty-five (65) West of the Sixth P. M., situate in the County of Niobrara and State of Wyoming, and

WHEREAS, the first well to be drilled on said above described premises by the terms of said contract is to be located and is located on the premises assigned to the Midnight Oil Company, and by said contract said Associated Oil Company has agreed to prosecute the work of drilling the said well continuously, barring unavoidable delays, until such well shall reach the depth of and test out the known productive oil sands in the Lance Creek Field, unless oil shall be found in commercial quantities at a lesser depth.

NOW, THEREFORE, and as a part of the consideration in the settlement of the above-entitled action, the undersigned hereby [2] guarantees that the said Associated Oil Company, or its assigns, will drill and complete a well on said last above-described premises commencing on or before

the 15th day of June, 1919, with a rig capable of reaching a depth of four thousand (4,000) feet, and shall prosecute the well continuously thereafter, barring unavoidable delays, until such well shall reach the depth of and test out the known productive oil sands in the Lance Creek Field, unless oil in commercial quantities shall be found in said well at a lesser depth, the cost of drilling and equipping said well shall be entirely at the cost of the said Associated Oil Company, or its assigns.

And should the said Associated Oil Company, or its assigns, for any reason, fail to drill and complete said well in manner and form as above specified, then and in that event and because the damage occasioned thereby to the Midnight Oil Company would be difficult, if not impossible to ascertain, and in consideration of the settlement and dismissal of said above suit, the undersigned, H. A. Rispin, agrees to pay to the said the Midnight Oil Company, the sum of Ten Thousand (\$10,000) Dollars as liquidated damages the same to be paid on notice of the failure of the said the Associated Oil Company, or its assigns, to drill and complete said well as above specified.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 13th day of May, A. D. 1919.

(Signed) H. ALLEN RISPIN. (Seal)"

V.

That neither said Associated Oil Company, nor its assigns, on or before the 15th day of June, 1919, or at any time since the 13th day of May, 1919, drilled or completed or commenced or prosecuted

the drilling of a well on the premises described in said written instrument, but on the contrary failed to commence to drill or to drill and failed to complete a well on said described premises in the manner and form specified in said written [3] instrument, or in any other manner or form or at all.

VI.

That heretofore and on or about the 10th day of February, 1920, plaintiff notified defendant in writing that such well had not been drilled or completed as provided for in said written instrument or at all and demanded that defendant pay to plaintiff said sum of Ten Thousand (\$10,000) Dollars as liquidated damages pursuant to the terms of said written instrument.

VII.

That defendant has at all times failed and refused to pay to plaintiff said sum of Ten Thousand (\$10,000) Dollars, or any part thereof.

VIII.

That it would be, was and is impracticable and extremely difficult to fix the actual damages which would be suffered or was suffered by the plaintiff by reason of the failure of said Associated Oil Company, or its assigns, to drill or to commence to drill a well on said premises as guaranteed by defendant herein.

WHEREFORE plaintiff prays judgment against defendant in the sum of Ten Thousand (\$10,000.00) Dollars, together with interest thereon at the rate

of 8% per annum from February 10th, 1920, and for costs of suit.

DANA, BLOUNT & SILVERSTEIN,  
DUDLEY D. SALES,

Attorneys for Plaintiff. [4]

State of California,

City and County of San Francisco,—ss.

Dudley D. Sales, being first duly sworn, deposes and says: That he is one of the attorneys for the Midnight Oil Company, a corporation, plaintiff in the above-entitled action and makes this affidavit in its behalf for the reason that there are no officers of the plaintiff company present in the State of California where affiant has his offices; that affiant has read the foregoing complaint and knows the contents thereof; that affiant is informed and believes and upon such information and belief states the fact to be that the matters and facts set forth in said complaint are true.

DUDLEY D. SALES.

Subscribed and sworn to before me this 6th day of April, 1922.

[Seal]

CHARLES E. RUTH,

Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Apr. 8, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

(Title of Court and Cause.)

**Demurrer**

Comes now the defendant in the above-entitled action, and demurs to the complaint of plaintiff on file herein and for grounds of demurrer alleges:

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

WHEREFORE defendant prays that plaintiff take nothing by its action, and that he be hence dismissed with his costs.

A. L. WEIL,  
FORREST A. COBB,  
Attorneys for Defendant.

Receipt of copy of the within demurrer is hereby acknowledged this 5th day of May, 1922.

DUDLEY D. SALES,  
Attorney for Plaintiff.

[Endorsed]: Filed May 8, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

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At a stated term, to wit, the March term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 22d day of May in the year of our Lord one thousand nine hundred and twenty-two—Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

**Minutes of Court—May 22, 1922—Order Overruling  
Demurrer to Complaint.**

Defendant's demurrer to complaint came on to be heard and after arguments being submitted it is ordered that the said demurrer be and is hereby overruled. [7]

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(Title of Court and Cause.)

**Amended Answer.**

Comes now the defendant above named, and, by leave of the court first had and obtained, files this as and for his amended answer to the complaint of plaintiff on file herein, and admits, alleges and denies as follows:

**I.**

Alleges that on March 24, 1919, The Western States Oil and Land Company, a corporation, made, executed and delivered to The Hopewell Oil Company, a corporation, a certain lease, covering, among others, the lands referred to in the agreement set out in paragraph IV of plaintiff's complaint, copy of which lease is attached hereto, marked Exhibit "A" and is hereby made a part hereof.

**II.**

Alleges that on March 24, 1919, said The Hopewell Oil Company, a corporation, entered into a contract in writing with Associated Oil Company,



a corporation, covering the same lands described in said Exhibit "A," copy of which contract is attached hereto, marked Exhibit "B" and is hereby made a part hereof.

### III.

Alleges that on May 12, 1919, said The Hopewell Oil Company, assigned to plaintiff herein all its right, title and interest in and to the lands referred to in said paragraph of said complaint and arising out of said lease referred to in paragraph I above, and also all of the royalties and benefits accrued or thereafter accruing to said The Hopewell Oil Company from said Associated Oil Company by virtue of said contract referred to in paragraph II above, by an instrument in writing, copy of which is attached hereto and marked Exhibit "C" and is hereby made a part hereof, [8]

### IV.

Alleges that Exhibit "C" attached hereto is the assignment referred to in the third paragraph of the instrument set out in paragraph IV of plaintiff's complaint; alleges that Exhibits "A" and "B" attached hereto are the instruments referred to in said Exhibit "C."

### V.

Alleges that said Associated Oil Company was ready, able and willing to commence the drilling and completion of a well on the premises described in plaintiff's complaint on and before the 15th day of June, 1919; that plaintiff was unable, and failed, refused and neglected to deliver possession of same to said Associated Oil Company on or before said

date; that on or before said date, said Associated Oil Company attempted to secure possession of said premises but was prevented from so doing by threats of bodily harm to its servants and by forcible opposition on the part of persons claiming said premises adversely to plaintiff; that said Associated Oil Company has never been able to enter upon said premises; that except for plaintiff's said failure to deliver possession of said premises as aforesaid, said Associated Oil Company would have drilled and completed a well on said premises commencing on or before the 15th day of June, 1919, with a rig capable of reaching a depth of 4000 feet, and would have prosecuted the work of drilling said well continuously thereafter, barring unavoidable delays, until such well would have reached the depth of and tested out the known productive oil sands in the Lance Creek Field, unless oil in commercial quantities should have been found in said well at a lesser depth, and said Associated Oil Company would have paid the entire cost of drilling and equipping said well.

#### VI.

Alleges that said Associated Oil Company was barred by delays unavoidable on its part, from drilling or commencing to drill a [9] well on said premises, on or before said 15th day of June, 1919.

#### VII.

Alleges on information and belief that during the time when said Associated Oil Company was excluded from said premises, as aforesaid, wells have been drilled on the geologic structure underlying



said premises and said wells have reached the depth of and tested out the known productive oil sands in the Lance Creek Field, and have demonstrated that oil in commercial quantities does not exist under said premises; alleges that plaintiff has sustained no damage of any kind or nature by reason of anything set forth in its complaint on file herein.

### VIII.

Answering the allegations contained in paragraph VIII of said complaint, defendant denies that it would be, was, and is, or would be or was or is impracticable and extremely difficult or impracticable or extremely difficult to fix the actual damage which would be or was suffered by the plaintiff by reason of the failure of said Associated Oil Company, or its assigns, to drill or to commence to drill a well on said premises, and in that behalf, defendant alleges that at the time of executing the agreement set forth in plaintiff's complaint, and at all times since, it always has been and now is an extremely simple and easy matter to exactly compute any damages which might occur or have occurred to plaintiff by reason of such failure to drill a well within the time limited;

WHEREFORE, defendant prays that plaintiff take nothing by its said action and that defendant be hence dismissed with its costs of suit herein expended.

A. L. WEIL,  
FORREST A. COBB,  
Attorneys for Defendant. [10]

State of California,

City and County of San Francisco,—ss.

H. Allen Rispin, being first duly sworn, deposes and says:

That he is the defendant named in the above-entitled action; that he has read the foregoing amended answer and knows the contents thereof and the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

H. ALLEN RISPIN.

Subscribed and sworn to before me this 27th day of July, 1922.

[Seal]

FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California. [11]

**Exhibit "A".**

This agreement, made and entered into this 24th day of March, A. D. 1919, by and between The Western States Oil and Land Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, party of the first part, hereinafter called the Lessor, and The Hopewell Oil Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, party of the second part, hereinafter called the Lessee,—

**WITNESSETH:**

That for and in consideration of the covenants

and agreements hereinafter expressed to be fully kept and performed by the lessee, the lessor has leased, let and demised, and by these presents does lease, let and demise unto the lessee all of those certain pieces or parcels of land situate in the County of Niobrara and State of Wyoming, more particularly described as follows, to wit:

The West one-half (W.  $\frac{1}{2}$ ) of the Northwest quarter (NW.  $\frac{1}{4}$ ), and the North one-half (N.  $\frac{1}{2}$ ) of the Southwest quarter (SW.  $\frac{1}{4}$ ) of Section Seventeen (17), Township Thirty-five (35) North, Range Sixty-five (65) West of the Sixth Principal Meridian; also The East one-half (E.  $\frac{1}{2}$ ) of the Northeast quarter (NE.  $\frac{1}{4}$ ), and the North one-half (N.  $\frac{1}{2}$ ) of the Southeast quarter (SE.  $\frac{1}{4}$ ) of Section Eighteen (18), Township Thirty-five (35) North, Range Sixty-five (65) West of the Sixth Principal Meridian.

The lessor has furthermore demised and leased, and by these presents does demise and lease unto the said lessee all of the oil, gas, water and minerals of every kind and description in and under said lands and the right to sever and remove the same; also the right to construct and maintain telegraph and [12] telephone lines, pipe lines and roadways on or across the demised premises from adjoining lands; the right to erect and maintain buildings, derricks, tanks and other structures used and necessary for drilling for, producing, handling and selling the oil, gas, water and other minerals produced on said lands.

TO HAVE AND TO HOLD unto the said lessee for the full term of fifteen (15) years, and as long thereafter as oil, gas or other minerals are produced thereon in paying quantities by the lessee, or its assigns, provided all the covenants and agreements herein are fully kept and performed by said lessee.

The lessee agrees to immediately take possession of said premises, and to within sixty (60) days from the date hereof place thereon drilling materials, and to begin actual drilling of an oil well thereon on or before the 15th day of June, 1919, with a rig capable of reaching a depth of four thousand (4,000) feet; that it will prosecute the work of drilling continuously thereafter, barring unavoidable delays, until such well shall reach the depth of and test out the known productive oil sands in the Lance Creek Field, unless oil in commercial quantities shall be found in said well at a less depth. Should oil or gas in commercial quantities be produced in said first well drilled, then the lessee shall thereafter continue to drill and develop said premises for oil and gas as rapidly and as fully as is consistent with good management, and as conditions in the field will permit. Should said first well drilled, or should any later well drilled on said premises by the lessee prove unproductive of oil or gas in commercial quantities, the lessee shall have the right, on executing proper assignment or quitclaim deed of said lands in favor of the lessor, to surrender to the lessor all the lessee's rights and interests

in said lands, and in this lease, and the lessee shall thereafter be relieved from any further liability or obligation under this lease.

The lessee agrees to deliver as royalty to the lessor [13] one-eighth ( $\frac{1}{8}$ ) part of all crude oil, natural gas and other minerals produced and saved from said premises, the oil and gas to be delivered to the lessor free of charge, either in the pipe line or in tanks on said premises, or at the option of the lessor said royalty shall be paid to it in cash, the royalty to be in that case the value of one-eighth ( $\frac{1}{8}$ ) part of all the oil, gas and other minerals produced and saved from said lands, payment to be made on or about the 20th day of each month for all royalty products sold and disposed of during the preceding calendar month.

The lessee agrees to protect the land hereby leased against all claims for material and labor, and agrees to do all necessary assessment work on said lands on or before October 31st of each year, as long as said work is required by law to be performed, or as long as this lease is retained by the lessee.

In the event of a producing well being drilled, or having been drilled on adjacent lands within a linear distance of 400 feet from the boundary line of the premises hereby leased, the lessee agrees to immediately drill and complete a suitable offset well, or wells, to protect and conserve to the lessor and the lessee the oil and other kindred products of said demised premises. Should the lessee, its successors or assigns, fail to so commence drilling such



offset well, or wells, within sixty (60) days after notice in writing by the lessor to the lessee so to do, the lessor shall have the right to enter on said premises and drill said well, or wells, at its own proper cost and expense, and take unto itself the entire product thereof.

The lessee agrees to keep accurate logs of all wells drilled on said premises, and to keep full and accurate accounts of all production, all of which shall be open to the inspection of the lessor at all times.

It is agreed that in the event of the termination of this lease by forfeiture, or otherwise, or by abandonment of said premises, the lessee shall have the right to remove from said [14] premises all its tools, machinery, casing, tanks, building, pipe lines, derricks, and other property on said lands, or any part thereof.

It is understood between the parties hereto that the lessor claims the land hereby leased under and by virtue of a certain lease dated the 22d day of January, 1917, and recorded on the 16th day of April, 1917, in Book 23, at page 449 of the records of the office of the County Clerk and *Ex-officio* Register of Deeds of Niobrara County, Wyoming, wherein W. W. Wright, and others, are lessors, and the lessor herein is lessee, which lease is by reference incorporated herein and made a part of this lease, with the same effect as though fully written herein, and the lessee herein hereby covenants and agrees to fully carry out and perform all the terms and conditions of said lease required to be

performed by the lessee therein, except the provisions therein for the payment of royalty.

In the event that the lessee herein shall by reason of this lease acquire a preferential right to lease, or shall lease the lands herein described from the United States Government under any Act of Congress which may be passed authorizing or requiring such leasing by the Government, it is understood and agreed that such preferential right to lease, or any such lease gotten by the lessee herein, shall be taken by the lessee herein for the benefit of the parties hereto as shown by the terms and provisions of this lease.

If the lessee shall at any time fail or neglect to perform promptly any of the things to be done or performed by it under this lease, then the lessor shall have the option to cancel and annul this lease, and thereupon all the rights of the lessee in and to the land herein described, or any part thereof, shall be terminated, and the lessor may re-enter the said premises and take possession of the same, in all respects as though this lease had never been executed. [15]

The provisions, conditions, covenants and agreements herein contained shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by their

duly authorized officers in duplicate originals, this 24th day of March, A. D. 1919.

THE WESTERN STATES OIL AND LAND  
COMPANY.

By \_\_\_\_\_,  
President.

[Seal] Attest: \_\_\_\_\_,  
Secretary.

Witnesses:

\_\_\_\_\_  
\_\_\_\_\_

THE HOPEWELL OIL COMPANY.

By \_\_\_\_\_,  
President.

[Seal] Attest: \_\_\_\_\_,  
Secretary.

Witnesses:

\_\_\_\_\_  
\_\_\_\_\_ [16]

State of Colorado,  
City and County of Denver,—ss.

On this 25th day of March, A. D. 1919, before me appeared N. S. Wilson and C. E. Titus, to me personally known, who being by me duly sworn did say that they are respectively the President and Secretary of The Western States Oil and Land Company, a corporation; that the seal affixed to the above and foregoing instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said N. S. Wilson, as its President, and said C. E.



Titus, as its Secretary, acknowledged said instrument to be the free act and deed of said corporation.

Given under my hand and Notarial seal this 25th day of March, 1919.

My commission expires Jan. 8, 1920.

[Seal] CHRISTABEL E. E. SCOVILLE,  
Notary Public. [17]

**Exhibit "B."**

**OPERATING AGREEMENT.**

THIS AGREEMENT, Made and entered into this twenty-fourth day of March, 1919, by and between the Hopewell Oil Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, party of the first part, and Associated Oil Company, a corporation organized and existing under and by virtue of the laws of the State of California, party of the second part, WITNESSETH:

WHEREAS, the party of the first part is the lessee in a certain Oil and Gas Lease dated the 24th day of March, 1919, between The Western States Oil and Land Company, a Colorado corporation, as lessor, and The Hopewell Oil Company, as lessee, whereby said lessor leases to the lessee certain tracts or parcels of land, situated in the County of Niobrara and State of Wyoming, together with the oil, gas, water and minerals underlying the same, more particularly described as follows, to wit:

The West one-half (W.  $\frac{1}{2}$ ) of the Northwest quarter (NW.  $\frac{1}{4}$ ), and the North half (N.  $\frac{1}{2}$ )

of the Southwest quarter (SW.  $\frac{1}{4}$ ) of Section Seventeen (17), Township Thirty-five (35) North, Range Sixty-five (65) West of the Sixth Principal Meridian, and the East half (E.  $\frac{1}{2}$ ) of the Northeast quarter (NE.  $\frac{1}{4}$ ), and the North half (N.  $\frac{1}{2}$ ) of the Southeast quarter (SE.  $\frac{1}{4}$ ) of Section Eighteen (18), Township Thirty-five (35) North, Range Sixty-five (65) West of the Sixth Principal Meridian.

AND WHEREAS, the party of the first part desires to arrange for the operation and development of said lands for oil, gas and other minerals, under the terms of said lease.

NOW, THEREFORE, the party of the first part does by these [18] presents assign and transfer unto the said party of the second part all its right, title and interest in and to said lands, under and by virtue of said lease and subject to the terms thereof, for the additional consideration and upon the terms and conditions hereinafter stated:

AND IT IS HEREBY MUTUALLY AGREED as follows:

1. The said party of the first part shall immediately deliver possession of said lands to the party of the second part for operation under the terms of said lease, and under the terms of this agreement.

2. The party of the second part shall immediately take possession of and shall have the complete management and control of the lands above described, and of the development and operation thereof, and shall proceed to develop the same for oil and gas,

in accordance with and under the terms of said lease.

3. Said party of the second part shall furnish the capital and pay all the expenses and costs incurred in the development, equipment and operation of said lands, and of the protection and maintenance of the oil placer mining claims constituting the basis of the title on which the aforesaid lease is granted, and shall within sixty days from the date hereof place on said lands drilling materials, and shall begin actual drilling of an oil well thereon on or before the 15th day of June, A. D. 1919, with a rig capable of reaching a depth of four thousand (4000) feet, and shall prosecute the work of drilling said well continuously thereafter, barring unavoidable delays, until such well shall reach the depth of and test out the known productive oil sands in the Lance Creek oil field, unless oil in commercial quantities shall be found in said well at less depth. The cost of drilling and equipping said first well shall be borne entirely by the party of the second part, free of all cost or charge against the party of the first part herein.

4. In the operation of said premises under said lease [19] thereafter, the party of the second part shall charge forty (40%) per cent of all the cost and expenditure thus incurred to the party of the first part, and the party of the second part shall be reimbursed by the party of the first part thereof only from the first party's portion of the proceeds of oil and gas produced and sold from said premises. The second party shall market all crude oil and

marketable natural gas produced from said premises, and shall keep accurate accounts of such oil and gas so marketed from said lands and account to the party of the first part for forty (40%) per cent of the net proceeds of the same, at the price received therefor, after deducting said forty (40%) per cent of all the cost and expenditure thus incurred, together with interest thereon at the rate of six per cent per annum from the time said money is advanced until it is reimbursed in the manner herein provided. It is, however, understood and mutually agreed, that said advancements shall not be considered as a debt recoverable against the party of the first part but shall be subject to reimbursement out of the forty (40%) per cent of the proceeds of the product of said wells herein reserved to the party of the first part only, and conditioned upon there being sufficient such proceeds to make said reimbursement; and it is further mutually agreed, that said reimbursement shall be the actual cost and outlay only, and reasonable in amount, including a reasonable charge for book-keeping (not exceeding fifteen dollars for month per well), and shall include no overhead or corporate charges.

5. The party of the second part hereby agrees to render to the party of the first part monthly statements showing the monthly cost of development and operation of said property, and the wells thereon, from and after the time oil or gas is marketed from said premises, and remit monthly to the party of the first part for its forty (40%) per

cent portion of the proceeds of any oil and gas produced and sold from said premises after deducting the amount necessary to reimburse the party of the second part for cost of [20] operation and development, with interest as hereinabove provided.

6. The parties hereto shall co-operate at all times and in all ways in maintaining, protecting and perfecting the titles under which they hold the above described lands by said lease, to the end that the interests of the parties here shall be mutually protected.

7. Whenever in the judgment of the party of the second part any part or portion of the above described lands shall be beyond the water line, or nonproductive of oil or gas in paying commercial quantities, said party of the second part shall have the right, on executing proper assignment or quitclaim deed of any such lands, or lands in favor of said party of the first part, and on fully accounting to that date to surrender the same to said party of the first part, and the party of the second part shall thereafter be relieved from any further liability hereunder in connection with the development and operation of any such land, or lands, so surrendered.

8. The party of the second part hereby covenants and agrees to fully carry out and perform promptly all the terms and conditions to be performed on the party of the lessee in the lease hereby assigned, under which said lands are held.



9. The provisions, conditions, covenants and agreements herein contained shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed by their duly authorized officers in duplicate originals, this 24th day of March, A. D. 1919.

**THE HOPEWELL OIL COMPANY.**

By \_\_\_\_\_,  
President.

[Seal] Attest: By \_\_\_\_\_,  
Secretary.

Witness:

\_\_\_\_\_  
\_\_\_\_\_.

**ASSOCIATED OIL COMPANY. [21]**

By \_\_\_\_\_,  
Vice-President.

[Seal] Attest: By \_\_\_\_\_,  
Assistant Secretary of Said Company.

\_\_\_\_\_  
\_\_\_\_\_.

State of Colorado,

City and County of Denver,—ss.

On this 25th day of March, A. D. 1919, before me personally appeared George C. Manly and B. E. Thompson, to me personally known, who being by me first duly sworn, did say that they are respectively the President and the Secretary of the Hopewell Oil Company, a corporation; that the seal affixed to the above and foregoing instrument is the

corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by the authority of its Board of Directors, and that George C. Manly as its President, and B. E. Thompson as its Secretary, acknowledged said instrument to be the free act and deed of said corporation.

Given under my hand and notarial seal this 25th day of March, A. D. 1919.

My Commission expires March 31, 1919.

[Seal]                      HENRY N. BENNETT, Jr.,  
Notary Public. [22]

State of California,  
City and County of San Francisco,—ss.

On this 22d day of April, in the year one thousand nine hundred and nineteen, before me, Charles R. Holton, a notary public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared A. C. McLaughlin and J. P. Edwards known to me to be the vice-president and assistant secretary respectively of the Associated Oil Company, the corporation that executed the within and foregoing instrument, and to be the officers who executed the said instrument on behalf of said corporation therein named, and they acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco, the

day and year in this certificate last above written.

[Seal]

CHARLES R. HOLTON,

Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires Sept. 16, 1922. [23]

**Exhibit "C."**

**ASSIGNMENT OF LEASE AND OPERATING  
CONTRACT.**

KNOW ALL MEN BY THESE PRESENTS,  
That The Hopewell Oil Company, a corporation  
organized and existing under and by virtue of the  
laws of the State of Colorado, as party of the first  
part, in consideration of the sum of one dollar and  
other good and valuable considerations, to it in  
hand paid by The Midnight Oil Company, a cor-  
poration organized and existing under and by  
virtue of the laws of the State of Colorado, the  
receipt of which said consideration is hereby ac-  
knowledged, has sold, assigned, transferred and  
set over, and by these presents does sell, transfer,  
assign and set over unto the said The Midnight Oil  
Company all its right, title and interest in and  
to the following described lands, to wit:

The west half of the northwest quarter of  
Section seventeen (17) and the east half of the  
northeast quarter of Section eighteen (18) in  
Township thirty-five (35) north of Range 65  
West of the Sixth Principal Meridian, situate  
in the County of Niobrara and State of Wyo-  
ming,

arising from and out of the original indenture of  
lease bearing date the 24th day of March, 1919,



wherein The Western States Oil and Land Company is the lessor, and the above mentioned The Hopewell Oil Company is the lessee; and also all of the royalties and benefits accrued or hereafter accruing to The Hopewell Oil Company from "Associated Oil Company," a corporation organized and existing under and by virtue of the laws of the State of California, by virtue of a written contract between the two companies last above mentioned bearing date the 24th day of March, 1919, the same being a contract whereby "Associated Oil Company" agrees to develop and operate the lands above described and others.

The above Assignment of Lease and assignment of benefits arising out of the said operating contract is made in respect only to the lands above described, The Hopewell Oil Company reserving [24] for itself the north half of the Southwest quarter of Section seventeen (17) and the north half of the southeast quarter of Section eighteen (18), Township thirty-five (35) north of Range 65 West of the Sixth Principal Meridian, situate in the County of Niobrara, in the State of Wyoming, both as respects the rights of The Hopewell Oil Company, as Lessee, and in respect to the benefits arising from said operating contract; the purpose of this agreement being to subdivide both said lease and the said operating contract as above set forth.

TO HAVE AND TO HOLD by the said The Midnight Oil Company, its successors and assigns, subject, however, to all the terms, conditions, agreements, covenants and royalties expressed in said

lease, which said terms, conditions, agreements, covenants and royalties, The Midnight Oil Company agrees to keep, perform and pay so far as it relates to the above described land assigned to it and subject to the said operating contract as to all of the terms, conditions, agreements and covenants therein contained.

IN WITNESS WHEREOF, the said corporations have caused this instrument to be executed in duplicate this 12th day of May, 1919, their respective seals being hereto attached by authority.

THE HOPEWELL OIL COMPANY.

By \_\_\_\_\_,  
President.

[Seal] Attest: \_\_\_\_\_,  
Secretary.

Witness:

\_\_\_\_\_  
\_\_\_\_\_.

THE MIDNIGHT OIL COMPANY.

By \_\_\_\_\_,  
President.

Attest: \_\_\_\_\_,  
Secretary.

\_\_\_\_\_  
\_\_\_\_\_. [25]

State of Colorado,  
City and County of Denver,—ss.

On this 12th day of May, A. D. 1919, before me appeared George C. Manly and B. E. Thompson to me personally known, who being by me duly sworn did say that they are, respectively, the

President and Secretary of The Hopewell Oil Company, a corporation; that the seal affixed to the above and foregoing instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said George C. Manly, as its President, and said B. E. Thompson, as its Secretary, acknowledge said instrument to be the free act and deed of said corporation.

Given under my hand and Notarial Seal this 12th day of May, 1919.

My commission expires May 26, 1921.

[Seal]

MARGARET SCHAAF,  
Notary Public.

State of Colorado,  
City and County of Denver,—ss.

On this 12th day of May, A. D. 1919, before me appeared —— and ——, to me personally known, who being by me duly sworn did depose and say that they are, respectively, the President and Secretary of The Midnight Oil Company, a corporation; that the seal affixed to the above and foregoing instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said —— as its President, and said —— as its Secretary, acknowledged said instrument to be the free act and deed of said corporation.

Given under my hand and notarial seal this 12th day of [26] May, 1919.

My commission expires ———.

\_\_\_\_\_,  
Notary Public.

Due service and receipt of copy of the within Amended Answer is hereby acknowledged this 27th day of July, 1922.

DUDLEY D. SALES,  
Attorney for Plaintiff.

[Endorsed]: Filed July 27, 1922. Walter B. Mal-  
ing, Clerk. [27]

\_\_\_\_\_  
(Title of Court and Cause.)

**(Demurrer to Amended Answer.)**

Now comes plaintiff and demurs to defendant's first amended answer herein upon the following grounds:

I.

That said answer does not state facts sufficient to constitute a defense to plaintiff's complaint herein.

II.

That defendant's first defense to plaintiff's complaint herein, to wit: the defense set up in paragraphs I-VI, inclusive, of said answer does not state facts sufficient to constitute a defense.

WHEREFORE plaintiff prays judgment against defendant as prayed for in its complaint herein.

DANA, BLOUNT & SILVERSTEIN,  
DUDLEY D. SALES,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 2, 1922. W. B. Mal-  
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[28]

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At a stated term, to wit, the July term, A. D. 1922,  
of the Southern Division of the United States  
District Court for the Northern District of  
California, Second Division, held at the court-  
room in the City and County of San Francisco,  
on Monday, the 18th day of September in the  
year of our Lord one thousand nine hundred  
and twenty-two. Present: The Honorable  
WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

**Minutes of Court—September 18, 1922—Order Sus-  
taining Demurrer to Amended Answer.**

Plaintiff's demurrer to amended answer came  
on to be heard and after arguments being submitted  
it was ordered that said demurrer be and is hereby  
sustained; to which ruling defendant excepted.  
[29]

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(Title of Court and Cause.)

Before: Hon. WM. C. VAN FLEET, U. S. District  
Judge.

**Oral Opinion.**

Monday, January 22, 1923.

The COURT. (Orally.)—In this case the plain-  
tiff sues for damages arising out of the breach of

a contract which provides that, in the event of its breach plaintiff may recover a liquidated amount by reason of the difficulty of ascertaining the exact amount of damages that would result from the breach. An answer was put in to which a demurrer was subsequently sustained and no amended answer having been filed a default has now been entered. This is a motion to direct the Clerk to enter judgment upon the default in the liquidated amount specified in the contract. The usual course pursued in these courts, where there is a question as to the amount of damages which the plaintiff is entitled to recover, is to call a jury for assessment of the damages and that course has been suggested here; but I am satisfied from the authorities that this course is not called for where, as here, the parties have stipulated for liquidated damages, and in case where by reason of the difficulty of estimating the loss arising a stipulation of that kind would be good under the State statute. Under the State law if parties stipulate for liquidated damages in an instance where the actual damages resulting is readily ascertainable it is established that the stipulated sum will be treated as in the nature of a penalty, the stipulation void and the parties will be relegated to their rights under the contract as if no such stipulation had been made. Here the subject of the contract is such that it can readily be seen that it would be practically impossible to ascertain with any degree of certainty the actual damage suffered by the breach and in such an instance they were entitled to stipulate for



its liquidation. In such a case the intervention of a jury is wholly [30] unnecessary. The order accordingly will be that the plaintiff may have the Clerk enter a judgment for the amount stipulated in the contract.

[Endorsed]: Filed Feb. 6. 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

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At a stated term, to wit, the November term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday the 22d day of January in the year of our Lord one thousand nine hundred and twenty-three—Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

**Minutes of Court—January 22, 1923—Order for Judgment.**

Plaintiff's motion for a judgment by default, heretofore submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said motion be granted and that judgment be entered in favor of plaintiff and against defendant in the sum of \$12,360.00 together with costs. [32]

(Title of Court and Cause.)

**Judgment on Default.**

In this cause the defendant, H. Allen Rispin, having failed to file his second amended answer to the complaint after the sustaining of plaintiff's demurrer to the amended answer to the complaint, within the time allowed by order of Court, and the default of said defendant having been duly entered, and the Court, upon motion of Dudley D. Sales, Esq., attorney for plaintiff, having ordered that judgment be entered herein in accordance with the prayer of the complaint:

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that The Midnight Oil Company, a corporation, plaintiff, do have and recover of and from H. Allen Rispin, defendant, the sum of Twelve Thousand Three Hundred Sixty and No/100 (\$12,360.00) Dollars, together with its costs herein expended taxed at \$26.27.

Judgment entered January 22, 1923.

WALTER B. MALING,

Clerk. [33]



(Title of Court and Cause.)

**Petition for Allowance of Writ of Error and Order  
of Allowance.**

To the Honorable the United States District Court  
for the Northern District of California, Southern  
Division:

The above-named defendant in the above-entitled and numbered cause, considering himself aggrieved by the judgment made and entered in said cause on the 22d day of January, 1923, hereby prays this Honorable Court to allow a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in his assignment of errors filed herewith, and prays that a transcript of the record, proceedings and papers upon which said judgment was made and entered, as aforesaid, duly authenticated, may be sent to said Circuit Court of Appeals, sitting at San Francisco, California.

The judgment above referred to, and which this defendant desires to have reviewed by writ of error, as aforesaid, adjudged that this defendant pay to plaintiff the sum of Twelve Thousand Three Hundred and Sixty Dollars (\$12,360.00), together with costs amounting to Twenty-six and Twenty-seven Hundredths Dollars (\$26.27).

And said defendant further prays that this Honorable Court make and enter an order allowing such writ of error and fixing the amount of the security to be required to perfect these proceedings

and to stay execution on said judgment, pending the determination of said proceedings in error.

A. L. WEIL,

FORREST A. COBB,

Attorneys for Defendant. [34]

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**Order Allowing Writ of Error and Fixing Amount of Bond.**

The foregoing petition for writ of error having been presented to the Court and by it duly considered, it is hereby ordered that the said petition be, and the same is hereby granted and allowed, and the bond on said proceedings in error to be given on behalf of plaintiff in error is hereby fixed at Fifteen Thousand (\$15,000) Dollars, to be conditioned according to law.

Dated: February 9th, 1923.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Feb. 9, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [35]

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(Title of Court and Cause.)

**Assignment of Errors.**

H. Allen Rispin, defendant and plaintiff in error in the above-entitled cause, files with his petition for writ of error herein, the following assignments of error:

The Honorable United States District Court erred:

1. In overruling defendant's demurrer to plaintiff's complaint and in holding that said complaint states facts sufficient to constitute a cause of action against defendant.

2. In sustaining plaintiff's demurrer to defendant's amended answer and in holding that said amended answer does not state facts sufficient to constitute a defense to said action.

3. In directing judgment to be entered in favor of plaintiff and against defendant in accordance with the prayer of plaintiff's complaint.

WHEREFORE defendant prays the reversal of the judgment herein.

A. L. WEIL,

FORREST A. COBB,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: Filed Feb. 14, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[36]

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**Bond on Writ of Error.**

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND.

Home Office:  
Baltimore, Md.

Pacific Coast Dept. Office,  
San Francisco, Cal.

(Title of Court and Cause.)

KNOW ALL MEN BY THESE PRESENTS:  
That WHEREAS, H. Allen Rispin, the above-

named defendant and plaintiff in error, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause, heretofore made and entered herein on the 22d day of January, 1923.

NOW, THEREFORE, we, H. Allen Rispin, the above-named defendant and plaintiff in error herein, as principal, and Fidelity & Deposit Company of Maryland, a corporation duly authorized and allowed to become and act as surety upon bonds for undertakings, under and by virtue of an Act of Congress, as sole surety, are held and firmly bound unto the Midnight Oil Company, a corporation, the above-named plaintiff, and defendant in error herein, in the sum of Fifteen Thousand (15,000) dollars to be paid to the said The Midnight Oil Company, a corporation, its successors or assigns, for which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, firmly by these presents.

SEALED with our seals and dated the 12th day of March, 1923.

THE CONDITION of this obligation is such that if the said H. Allen Rispin, the above-named defendant, and plaintiff in error, herein, shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

The undersigned surety does hereby expressly covenant and agree that in case of a breach of said,

or any condition of this [37] bond, this Court may, upon notice to it of not less than ten days, proceed summarily in the above-entitled action, to ascertain the amount which it is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

IN WITNESS WHEREOF the undersigned have caused these presents to be duly executed and the said surety has caused its corporate seal to be affixed hereto by its duly authorized representatives.

H. ALLEN RISPIN.

FIDELITY & DEPOSIT COMPANY OF  
MARYLAND. (Seal)

By JOHN F. ROBERTSON,  
Attorney in Fact.

Attest: F. M. PALMER,  
Agent.

Approved: March 13, 1923.

R. S. BEAN,  
Judge.

[Endorsed]: Filed Mar. 13, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[38]

(Title of Court and Cause.)

**Praeipice for Transcript by Plaintiff in Error.**

To Walter B. Maling, Clerk of the United States  
District Court, Northern District of California,  
Southern Division:

Please prepare and duly certify, for the proceedings in error of defendant, H. Allen Rispin, to the United States Circuit Court of Appeals for the Ninth Circuit, against the judgment in the above-entitled and numbered suit in favor of the plaintiff and against said defendant, made and entered on the 22d day of January, 1923, a transcript, incorporating the following portions of the record herein:

**RECORD ON APPEAL.**

Complaint.

Demurrer to complaint.

Order overruling demurrer to complaint.

Amended answer.

Demurrer to amended answer.

Order sustaining demurrer to amended answer.

Order for judgment.

Judgment.

Petition for allowance of writ of error and order  
of allowance.

Assignment of errors.

Writ of error.

Citation on writ of error.

Bond on proceedings in error.

This praeipice.



Dated: February 8th, 1923.

A. L. WEIL,

FORREST A. COBB,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: Filed Feb. 23, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[39]

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(Title of Court and Cause.)

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing thirty-nine (39) pages, numbered from 1 to 39, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$16.45; that said amount was paid by the defendant and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 14th day of March, A. D. 1923.

[Seal]                      WALTER B. MALING,  
Clerk United States District Court for the Northern  
District of California. [40]

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### **Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division, GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between H. ALLEN RISPIN, plaintiff in error, and THE MIDNIGHT OIL COMPANY (a corporation), defendant in error, a manifest error hath happened, to the great damage of the said H. ALLEN RISPIN, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the

same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 14th day of February, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

R. S. BEAN,  
Dist. Judge. [41]

Receipt of a copy of the within writ of error is hereby admitted this 23d day of February, 1923.

DUDLEY D. SALES,  
Attorney for Plaintiff and Defendant in Error.

### **Return to Writ of Error.**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things



for the Northern District of California, Southern Division, wherein H. Allen Rispin is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable R. S. BEAN, United States District Judge for the Northern District of California, this 23d day of February, A. D. 1923.

R. S. BEAN,

United States Dist. Judge. [42]

Receipt of a copy of the within Citation on writ of error is hereby admitted this 23d day of February, 1923.

DUDLEY D. SALES,

Attorney for Plaintiff and Defendant in Error.

[Endorsed]: No. 16,718. United States District Court for the Northern District of California, Southern Division. H. Allen Rispin, Plaintiff in Error, vs. The Midnight Oil Company (a Corporation), Defendant in Error. Citation on Writ of Error. Filed Feb. 26, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 3994. United States Circuit Court of Appeals for the Ninth Circuit. H. Allen Rispin, Plaintiff in Error, vs. The Midnight Oil Company, a Corporation, Defendant in Error.

Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed March 14, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.